

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 372 of 1983

with

INCOME TAX REFERENCES NO. 86/85, 90/86 & 101/88

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER

and

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ASHABEN ROHITBHAI

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR MONISH J. SHAH for Petitioner

MR MIHIR JOSHI WITH MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE M.C.PATEL

Date of decision: 29/06/98

COMMON ORAL JUDGEMENT

1. First two references are at the instance of assessee, whereas the remaining two are at the instance of revenue. In ITR No. 372 of 1983, the following two questions have been referred for opinion of this Court;

1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the shares held by the HUF should be considered while determining the "substantial interest" in the Company for the purpose of Explanation 2(i) to Section 64(1)(ii) of the Act?

2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in its interpretation of the proviso to section 64(1)(ii) and holding that the same was not applicable in the case of the appellant ?

2. In ITR No. 86 of 1985, three questions have been referred for our opinion, which read as under:

1) Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that the shares held by the HUF should be considered while determining the "substantial interest" in the Company for the purpose of Explanation 2(i) to section 64(1)(ii) of the Act ?

2) Whether, on the facts and circumstances of the case, the Tribunal was right in law in its interpretation of the proviso to section 64(1)(ii) and holding that the same was not applicable in the case of the appellant ?

3) Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that deduction under sec. 80T is admissible with reference to the capital gain only after setting off the capital loss ?

3. In ITR No. 90 of 1986, the following two questions are referred for our opinion;

1) Whether, the salary income received by the assessee as a Managing Director of the Rajiv Traders Pvt. Ltd., in which assessee's husband and substantial interest, is not taxable in the hands of the assessee, but is liable to be included in the hands of the assessee's husband under section 64(1)(ii) of the IT Act, 1961 ?

2) Whether, when several factors were pointed out

regarding experience, qualification etc. the Appellate Tribunal was right in law in taking a view that the salary income from Rajiv Traders Pvt. Ltd. should be taxed in the hands of the assessee and not taxed in the assessment of her husband ?

4. In the last reference i.e. ITR No. 101 of 1988, the following question is referred;

1) Whether, the salary income received by the assessee as the Managing Director of M/s. Rajiv Traders Pvt. Ltd. in which her husband has a substantial interest was taxable in her hands on a substantive basis ?

5. The assessee Smt. Ashaben Rohitbhai was working as Managing Director in M/s. Mc-Gaw-Ravindra Laboratories (India) Ltd., a company, registered under the Companies Act, 1956, and was getting remuneration from the said company. One of the questions, which arose for consideration was as to whether the remuneration received by her would be treated as her substantive income under the Proviso to Section 64(1)(ii) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') or that it should be considered as income of her husband Rohitbhai.

6. The second question was whether the holding of shares by Rohitbhai should be considered as shares held by the HUF of Rohitbhai held beneficially by him and falling within the provisions of Section 64(1)(ii) of the Act.

7. The third question which was raised before the authorities which is one of the questions in Income Tax Reference No. 86 of 85, was whether deduction under Section 80T of the Act was admissible with reference to capital gain after setting off the capital loss.

8. So far as the third question raised in ITR No. 86 of 1985 at the instance of assessee is concerned, it was decided against the assessee and in favour of revenue by all the authorities including the Appellate Tribunal following the decision of this Court in Commissioner of Income Tax, Gujarat vs. Gautam Sarabhai, 129 ITR 133. Our attention was invited at the time of hearing of the

reference that now the question is finally determined by a pronouncement of the Supreme Court in H.H. Sir Rama Varma vs. Commissioner of Income Tax, 205 ITR, p. 433. Their Lordships of the Supreme Court in H.H. Sir Rama Varma have observed that the view taken by several High Courts including the High Court of Gujarat that the deduction under Sec. 80T is admissible with reference to the capital gain only after setting off the capital loss was correct and accordingly the said view was confirmed.

9. In view of the decision of this Court as well as of the Supreme Court, the said question must be answered in the affirmative, that is, against the assessee and in favour of revenue.

10. As far as the question regarding the holding of shares by Rohitbhai is concerned, the case of Rohitbhai was that he was holding the shares independently and that the authorities as well as the Tribunal had committed an error of law in holding that the shares held by him as beneficiary of HUF. At the time of hearing, however, Mr Shah learned counsel for the assessee submitted that in case the second question in ITR No. 372 of 1983 is answered in favour of assessee and income of Ashaben is held to be her income by applying Proviso to Section 64(1)(ii), he would not press the first question and, it would not be necessary for this court to answer the question regarding holding of shares by Rohitbhai and, no opinion may be expressed thereon.

11. The point for our consideration, therefore, is whether authorities below were right in law in interpreting the Proviso to Section 64(1)(ii) and in not extending the benefits thereunder to Ashaben Rohitbhai.

12. Section 64 is in Chapter-V, which provides for income of other persons which are to be included in assessee's income. The said section enacts that in computing the total income of any individual there shall be included the income arises to the spouse, minor child etc. received from a concern in which such individual has a substantial interest.

The Proviso to Section 64(1)(ii) reads;

Provided that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or

her technical or professional knowledge and experience.

13. The case of the assessee was that she was working as Managing Director in M/s. Mc-Gaw-Ravindra Laboratories (India) Ltd., a public limited company registered under the Companies Act, 1956 and in that capacity, she was paid remuneration. According to the assessee the income received by her ought to have been considered as her independent income under the Proviso to Section 64(1)(ii) of the Act, and the authorities have committed an error of law in applying Clause (ii) of sub-section (1) and by treating her income as income of her husband and by assessing it on that basis. In ITR Nos. 372 of 1983 and 86 of 1985, we are concerned with the assessment years 1978-79, 1979-80 and 1980-81 respectively. In these three assessment years, the authorities decided against the assessee treating her income as the income of her husband Rohitbhai. The Tribunal also applied clause(ii) sub-section(1) of Section 64 relying on a decision of Income Tax Appellate Tribunal, Bombay, Special Bench-B in Dr. J.N. Mokashi v. ITO, I.T.A. No. 2273 (Bom) /79 dated 28th July, 1981. A reference to that decision was made in the judgment. In Mokashi, the Tribunal considered clause (ii) and proviso and held that technical or professional knowledge would mean special knowledge of mechanical or scientific subject or of any particular subject. Likewise, experience should include experience acquired in the course of technical or professional qualifications.

14. In the instant case, it was the case of the assessee that even before she was appointed as Managing Director in McGaw Ravindra Laboratories (India) Ltd., she had worked as Managing Director in two companies in past, and that she had sufficient professional qualifications and experience within the meaning of Proviso to Clause (ii) of Section 64(1). The said contention, however, was negatived and it was held that her income should not be treated as independent income but it should be included in the income of her husband.

15. In subsequent four years, however, the tribunal decided the question in favour of assessee which is challenged in ITR No. 101 of 1988. The Tribunal observed that though in past, the point was decided against the assessee on the basis of a decision of Appellate Tribunal, Bombay, subsequently, there was a

decision of the High Court of Andhra Pradesh in Batta Kalyani vs. Commissioner of Income-Tax, 154 ITR 59. Following that decision, the point was decided in favour of assessee and against the revenue.

16. The question, therefore, is whether the case falls within the Proviso to Clause (ii) of section 64(1) of the Act, and; whether assessee can get the benefits thereunder. It is true that Clause(ii) of sub-section(1) contemplates that in computing the total income of any individual, there shall be included all such income as arises directly or indirectly to the spouse of such individual. It is also true that clause (ii) refers to payment made by way of salary, commission, fees or any other form of remuneration to the spouse of such individual in which such individual has substantial interest. But the proviso engrafts an exception and provides that clause(ii) will not apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience.

17. Our attention was invited by the learned counsel for the assessee to the following decisions:

Batta Kalyani vs. Commissioner of Income-Tax, 154 ITR 59 (Andhra Pradesh);

Commissioner of Income Tax vs. D. Rajagopal, 154 ITR 375 (Karnataka);

Commissioner of Income-Tax vs. Sorabji Dorabji, 168 ITR 598 (Kerala);

Commissioner of Income-Tax vs. Madhubala Shrenik Kumar, 181 ITR 180 (Madhya Pradesh);

18. From the above decisions, it is clear that before benefit of the proviso is claimed, certain conditions must be fulfilled. A spouse must possess technical or professional qualifications and the income must be derived by such spouse from the application of technical or professional knowledge and experience, i.e. the income must be solely attributable to the application of such knowledge and experience. The authorities and the Tribunal held that since the assessee was not holding necessary qualifications, the case could not be said to

have been covered by the proviso and she was not entitled to benefits thereof. The contention on behalf of the assessee is that to invoke the benefit of the proviso, it is not necessary that a person must hold a degree or diploma, if such is not the requirement of law. In this connection, heavy reliance was placed on Batta Kalyani. In that case, the assessee was running a hardware and paint shop. She employed her husband to manage the business and paid him salary. The ITO included the salary in the total income of the assessee which was upheld by the Tribunal. On behalf of the assessee, it was contended that an error of law was committed by the Tribunal in not extending the benefits of proviso in favour of the husband. On the other hand, revenue contended that the husband of shop owner was not possessing technical or professional qualifications and hence the proviso had no application. Upholding the contention on behalf of the assessee and interpreting proviso to clause-(ii) of Section 64(1), the High Court of Andhra Pradesh observed:

"We find considerable force in the submission of the learned counsel for the assessee that the words "technical or professional qualifications" occurring in the first part of the proviso do not necessarily relate to the technical or professional qualifications acquired by obtaining certificate, diploma or a degree or in any other form from a recognised body like a university or an institute. That this was not the intention of the Legislature is clear from the use of the expression "knowledge and experience" in the latter part of the proviso, as otherwise it would have been perfectly permissible for the Legislature to use the same expression as occurring in the first part. The harmonious construction of the two parts of the proviso, in our opinion, would be that if a person possesses technical or professional knowledge and the income is solely attributable to the application of such technical or professional knowledge and experience, the requirement for the application of the proviso is satisfied, although the person concerned may not possess any qualification issued by a recognised body. In our opinion, the Tribunal erred in coming to the conclusion that unless a recognised body conferred a qualification, it should not be considered that a person possessed technical or professional qualifications. It is enough, in our opinion,

for the purpose of the proviso, if the recipient of the salary possesses the attributes of technical or professional qualifications, in the sense that he has got expertise in such profession or technique, the person concerned earns salary, then the latter part of the proviso is also satisfied." (emphasis supplied).

19. A similar view was taken by the High Court of Karnataka in D. Rajgopal. The Court observed that the proviso contemplates two conditions: (i) the spouse must possess technical or professional qualifications; and (ii) the income derived by him or her must be attributable to the application of such technical or professional knowledge and experience. The Court, however, stated that the requirement of technical or professional qualification is not general in terms. It must relate to the post which he or she occupied and, secondly, the salary or fees must be attributable to the application of his or her technical or professional knowledge. If these two conditions are fulfilled, the income must be considered to be of that person and should be assessed accordingly. In Madhubala Shrenik Kumar, the High Court of Madhya Pradesh also held that the expression "technical or professional qualifications" does not mean degree or diploma from a recognised institute. Following the decision in Batta Kalyani, the Court held that it is also not the requirement that before a person claims benefits of proviso, he must prove that he has obtained a certificate of diploma or degree from a recognised body like university or any institute.

20. On behalf of the revenue, however, reliance was placed on a decision of High Court of Bombay Dr. J.N. Mokashi vs. Commissioner of Income-Tax, 207 ITR 252. To recall, the Tribunal in first two matters, decided the question against the assessee relying on a decision of Income Tax Appellate Tribunal at Bombay in the case of Dr. J.N. Mokashi. The said matter was carried by the assessee to the High Court and the High Court of Bombay, confirming the view taken by the Tribunal decided the question against assessee and in favour of revenue.

21. It was contended that the High Court of Bombay upheld the decision of the Tribunal answering the question against the assessee and in favour of revenue. We have been taken to the said decision by the learned

counsel for the revenue. In Dr. Mokashi, the assessee was a medical practitioner. He had employed his wife as a receptionist-cum-accountant. She had passed First Year Arts. For the assessment year 1978-79, the assessee paid Rs 8,100/ to his wife by way of salary. The ITO, applying the provisions of Section 64(1)(ii) of the Act, included that amount in the income of the assessee. The order was confirmed even by the tribunal. The assessee approached the High Court.

22. The question before the High Court was whether or not the wife of the assessee possessed technical or professional qualifications and whether or not the salary received by her by application of technical or professional knowledge and experience.

23. Referring to Dictionary meanings of "qualification" and "profession" and dissenting with the view taken by various High Courts, the Court stated;

In the instant case, the spouse of the assessee neither possessed any technical or professional qualification nor was she paid for any technical or professional services rendered by her. Admittedly, she had passed first year Arts of the Bombay University and that was her only qualification. She was employed by her husband, the assessee in this case, as receptionist-cum-accountant and paid a salary for that employment. In such a case, it is not only difficult but impossible to hold that she possessed any "technical or professional qualification" which is necessary to bring her within the proviso. That being so, the proviso to section 64(1)(ii) is not applicable to her and, as such, the assessee is not entitled to get the benefit thereof to bring her income out of the purview of the clubbing provision contained in section 64(1)(ii)."

24. At the same time, however, the Court held that a person can be said to possess requisite technical qualifications by virtue thereof, if he is eligible to perform the particular function. Similarly, professional qualification would mean qualification which is necessary for carrying on the particular profession such as medical profession or legal profession. If the job is of a technical nature requiring degree or diploma, holding of such degree or diploma would be essential. The nature of

professional qualifications, however, vary from profession to profession. Likewise, the nature of technical qualifications also differ depending on nature of technical job. It was, however, stated that it is not each and every qualification, academic or otherwise, which can bring the spouse within the scope of proviso so as to enable him or her to take the income out of clubbing provision. If the spouse is possessing technical or professional qualifications necessary to undertake the particular technical job or carrying on profession to which the income is attributed, that will meet the requirement of the first part of the proviso. But even if the first part of the proviso is complied with, it must further be shown that the payment made to the spouse is attributable to the application of such technical or professional knowledge and experience falling under the latter part thereof.

25. In the case on hand, the assessee was working as Managing Director. It was her case that before she was working as Managing Director in the present company, she had experience as Managing Director, and had received substantial sums as remuneration. In her communication, dated May 8, 1980, she has stated that before she was taken as Managing Director in Mc-Gaw Ravindra Laboratories (India) Ltd., she had worked as Managing Director with C. Doctor & Co. Pvt. Ltd., from 1958 to 1961, as a Director with Bipin Silk Mills Co. Pvt. Ltd from 1961, and then she had worked as a Chairperson in Rajiv Netting Pvt. Ltd. She was also asked to look after certain works mentioned in the letter. It was further stated that considering the nature of duties and work put in by her, the Company Law Board had permitted increase in her salary. The said letters were also relied upon and the copies thereof were produced alongwith the representation. It was further her case that Mc-Gaw Ravindra Laboratories (India) Ltd. was a public limited company which had 40% equity participation of foreign collaborator. It is also on record that she was having a Master degree (M.A.). It is not even the case of the revenue that any degree or diploma is required for the post of Managing Director either under the Companies Act or under any other law.

26. In the light of all these facts, it cannot be said that the case does not fall under the proviso to clause (ii) of sub-section (1) of Section-64, particularly when the nature of work did not require any statutory qualification and that she was having experience as Director, Chairperson and also as Managing Director in past in some companies and the Company Law

Board has also permitted increase in her salary. In our opinion, therefore, the first part of the proviso can be said to have been complied with.

27. So far as the second part is concerned, there is no finding against assessee that the income was not solely attributable to the application of her technical or professional knowledge and experience. On the contrary, in ITR No. 90 of 1986 that is, after the Tribunal followed the decision in Batta Kalyani, it was specifically observed;

Therefore, it can fairly be said that she has got this remuneration solely because of her qualification. In that view of the matter, we hold that the salary income of the assessee could be taxed only at her income and not taxed in the assessment of her husband. Therefore, the protective assessment of the assessee should be made into substantive assessment." (emphasis supplied).

28. We are in agreement with the view taken by the High Courts of Andhra Pradesh, Karnataka, Kerala and Madhya Pradesh.

29. In our opinion, the submission made on behalf of the assessee is well founded and deserves to be upheld. Accordingly, question no. 2 in ITR NO. 372 of 1983 and ITR No. 86 of 1985 must be answered in the negative i.e. in favour of the assessee and against the revenue. Question No. 1 in ITR No. 372 of 83 and 86 of 85 are not answered. Question No. 3 in ITR No. 86 of 85 is answered in the negative, i.e. against the assessee and in favour of the revenue. Likewise, questions no. 1 and 2 in ITR NO. 90 of 1986 must be answered in the negative, that is, against the revenue and in favour of the assessee. Question no. 1 in ITR NO. 101 of 1988 is also decided in affirmative that is in favour of the assessee and against the revenue.

30. All the references are accordingly disposed of. In the facts and circumstances of the case, there shall be no order as to costs.
